

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LLOYD CHARLES EVANS,

Defendant and Appellant.

G041341

(Super. Ct. No. 08CF0689)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

\*

\*

\*

A jury convicted Lloyd Charles Evans of theft (Pen. Code, § 484, subd. (a); all statutory citations are to the Penal Code) after a Santa Ana department store security employee testified that on the evening of June 15, 2007, defendant concealed three pairs of blue jeans worth about \$45 and walked out of the store without paying. In a bench trial, the court found to be true the allegations defendant had served five separate prior terms within the meaning of section 667.5, subdivision (b). The court struck four of the prior convictions and imposed a 28-month prison sentence consisting of a 16-month low term and an additional year for the remaining prior.

We appointed counsel to represent defendant on appeal. Counsel filed a brief setting forth a statement of the case, but advised the court he found no issues to argue on defendant's behalf. Defendant, however, has submitted a supplemental brief at our invitation. Both counsel and defendant identify the same issue for our review: Whether defendant suffered a violation of his speedy trial rights under section 1381. After examining the record, we conclude the issue does not warrant further appellate review.

Section 1381 provides that a defendant who has entered state prison may notify the district attorney of his desire to be brought to trial on any other pending charges against him, and the district attorney "shall bring the defendant to trial or for sentencing within 90 days after the person shall have delivered to said district attorney written notice of the place of his or her imprisonment . . . and his or her desire to be brought to trial or for sentencing . . . ." If the defendant is not brought to trial within 90-days, the court "shall . . . dismiss the action." (*Ibid.*) The same time limit applies where "a charge is filed against a person during the time the person is serving a sentence in any state prison . . . ." (*Ibid.*) The purposes of the statute include avoiding prolonged

imprisonment, limiting anxiety attendant to unresolved criminal charges, reducing the effect of the lapse of time on trial witnesses, and providing an opportunity for imposition of concurrent sentencing. (*Gonzalez v. Superior Court* (2008) 166 Cal.App.4th 922; *People v. Simpson* (1973) 30 Cal.App.3d 177.)

On August 29, 2008, after the verdict and before sentencing, defendant moved to dismiss his case under section 1381. The evidence at the hearing showed the arresting officer issued a citation on the petty theft charge directing defendant to appear in court on August 22, 2007. Defendant was taken into custody for a preexisting parole violation on June 18, three days after his petty theft arrest. On July 6, defendant notified the Orange County District Attorney of his demand for a speedy trial under section 1381. In his demand, defendant referred to the case number that appeared on the citation: 07-23597.

The district attorney responded by letter to defendant on August 9, 2007, noting that defendant was on active probation in case No. 05HF0729, there were no pending probation violation warrants at the time, and section 1381 did not apply to probation violations. The district attorney stated he would take no further action in the matter and advised defendant that he should direct any request to resolve a probation violation to the court. In a separate letter, the district attorney stated it was recommending dismissal of another case numbered CM2043058 pending in the Harbor Justice Center.

Defendant asserts he “filed” a motion to dismiss on October 5, 2007. The clerk’s transcript contains a one-page motion to dismiss without a filing stamp listing case Nos. 07-23597 and CM2043058 and citing section 1382. The district attorney’s office sent defendant a letter dated October 12 stating it was recommending the court

dismiss case No. CM2043058 and recall the warrant, to allow six to eight weeks for processing, and defendant should direct any further inquiries to the court. The clerk's transcript contains an identical one-page motion to dismiss dated October 21, 2007. The trial court denied defendant's motion to dismiss.

The evidence in the record demonstrates no support for a section 1381 violation. At the time defendant notified the district attorney, the current charges had not been filed. "Thus, because no charge had been filed against him as of the date he made his demand, he was not a person described in [] section 1381 and his demand did not have the effect of triggering the 90-day rule." (*People v. Belton* (1992) 6 Cal.App.4th 1425, 1433.) Similarly, the complaint was not "'filed against [him] during the time [he was] serving a sentence in any state prison . . .'" (*Id.* at p. 1432.)

Defendant also relies on section 853.9. This section provides that "Whenever written notice to appear has been prepared, delivered, and filed by an officer or the prosecuting attorney with the court pursuant to the provisions of Section 853.6 of this code, an exact and legible duplicate copy of the notice when filed with the magistrate, in lieu of a verified complaint, shall constitute a complaint to which the defendant may plead 'guilty' or 'nolo contendere.'"

There is no evidence the officer or prosecuting attorney filed the notice to appear with the court, or that defendant appeared in court or deposited bail on the notice to appear, and section 853.9 provides in that circumstance "a complaint shall be filed which shall conform to the provisions of this code and *which shall be deemed to be an original complaint*; and thereafter proceedings shall be had as provided by law . . . ." The notice to appear did not serve as a complaint, and therefore defendant's notification did

not trigger section 1381. (See *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 752 [prosecutor has discretion to file a formal complaint in all cases].)

We have reviewed the record for other arguable issues pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and have found none. We therefore affirm the judgment.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.